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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 1.17 of the	)	**GC Docket No. 02-37**
Commission's Rules Concerning Truthful	)	
Statements to the Commission.	)	

COMMENTS OF JAMES A. KAY, JR.

James A. Kay, Jr. ("Kay"), by his attorney, hereby offers Comments on the *Notice of Proposed Rule Making* ("*NPRM*"), FCC 02-54, released February 22, 2002, in the above-captioned matter, in support whereof the following is respectfully shown:

A. INTRODUCTION

The stated intention of the *NPRM* is not to make substantive regulatory changes but merely to clarify the rule in order not to "hamper our ability to take enforcement action in those rare cases where persons dealing with the Commission do not exercise the requisite care to ensure that they submit accurate information." *NPRM* at ¶ 3. One must question why it is necessary—and whether it is prudent and in the public interest—to expend Commission resources on an entire rulemaking proceeding to clarify an existing rule to address admitted rare circumstances, where the obligations, even as "clarified" are already clear.

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B. SPECIFIC PROBLEMS WITH THE PROPOSED REVISED RULE

Kay has two particular problems with the proposed regulatory language, each of which calls into question whether this is merely a "clarification," as stated, or whether there is instead (whether intended or not) a substantive change in regulatory obligations. First, the revised rule would greatly expand of the scope and type of information which the recipient of a Commission

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request is obligated to provide. Second, the proposed rule would be extended to unintentional misstatements or omissions. Each of these is problematic, as discussed seriatim, below.[1]

1. EXPANDING THE SCOPE OF RELEVANCE

The *NPRM* lists among its purposes to clarify "that the rule covers statements made to the Commission in all contexts." *NPRM* at ¶ 3. But this is already clear from the Note to the existing Section 1.17 which explicitly states that the regulation does not cover the entire universe of situations and expressly states that there is an "obligation ... in all instanced to respond truthfully to requests for information deemed necessary to the proper execution of the Commission's functions." 47 C.F.R. § 1.17, Note.

Neither Kay nor anyone else will seriously challenge a policy that any statements made or information provided to the Commission in its official capacity, regardless of the context, ought to be complete, accurate, and truthful. Indeed, this is so obvious as to beg the question why it is even necessary to engage the rulemaking process to clarify it. But whether it is necessary or advisable to amend the language of this particular rule to so state is a different question. More important, however, any amended language must not go further than ostensibly intended so that it imposes other obligations and burdens that are not proper. Kay submits that the proposed revised rule does just that.

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[1] The NPRM also seeks to extend the scope of the rule to parties other than licensees and applicants. Kay maintains that the obligation to respond to informal requests for information issued pursuant to Section 308(b) of the Act—and, by extension, Section 1.17 of the Rules—is voluntary, not compulsory. See Attachment No. 1, hereto, *Petition for Rulemaking* at Section II.A.2, pp. 3-4. However, assuming without conceding that a subpoena is not necessary for a Section 308(b) information request made to an applicant or a licensee in the context of a Title III licensing proceeding, there is no reading of the Communications Act that would extend to the discretionary authority to compel the production of statements, documents, and information in other contexts or from non-licensees outside the parameters set forth in Section 409 of the Communications Act.

The current rule, based as it is on Section 308(b) of the Communications Act, speaks in terms of the request for and responsive provision of information in connection with application and licensing proceedings, including renewal and revocation proceedings. The revised rule would authorize "[t]he Commission or its representatives [to], in writing, require written statements of fact relevant to the determination of any matter within the jurisdiction of the Commission." *Proposed Section 1.17(a)*. Again, this is almost a truism with which there can be little if any argument. The Commission may, to be sure, request information relevant to its statutory obligations. But the proposed revision would, whether intentionally or not, expand the scope of what information is deemed relevant for purposes of determining whether a response is complete, or whether a response omits critical information. The proposed rule would proscribe the omission of "any material information bearing on *any matter within the jurisdiction of the Commission*." Proposed Section 1.17(b) (emphasis added). While this language is also in the current version of the rule, it is susceptible of overbroad interpretation and application in the context of this rulemaking.

If the subject phrase is interpreted too narrowly, it becomes overbroad. A strict and literal reading could impose on the respondent to a Commission request for information an obligation to seek out and provide all information on virtually any potentially relevant matter within the Commission's jurisdiction, whether or not it is proximately relevant to the information request.

Kay opposes a regulation that contains language capable of such interpretation. If the rule is amended at all, it should be reworded to clarify that the obligation extends to any and all information reasonably necessary to be fully, accurately, and candidly responsive to the request given the particular surrounding circumstances. While a respondent is certainly not justified in interpreting an information request in an overly restrictive fashion so as to conceal relevant information from the Commission, it is nonetheless not the obligation of the responded to ponder what other areas within its jurisdiction that the Commission *might* have inquired into and to

collect and produce all information that is potentially relevant to a theoretically jurisdictional request other than the one specifically put by the Commission. Giving the Commission or its staff such broadly intrusive power is clearly beyond the scope of the powers conferred upon the Commission by Congress. The Commission does not have the investigatory authority "to require [licensees] to bare their records, relevant or irrelevant, in the hope that something will turn up." *Stahlman v. FCC*, 126 F.2d 124, 128 (D.C. Cir. 1942).

2. EXTENDING THE RULE TO NEGLIGENCE

The current rule directly and simply provides that a respondent may not "make any misrepresentation or willful material omission." 47 C.F.R. § 1.17. The revised regulation would provide that one may not "intentionally or negligently provide incorrect material information or intentionally or negligently omit any material information." *Proposed Rule 1.17(b)*. This is an entirely unnecessary change. It apparently seeks to extend the scope of the rule to unintentional misstatements or omissions that are culpable in some degree without rising to the level of an actual intent to deceive. It is not necessary to amend the rule to achieve that purpose.

If one indeed intends to deceive the Commission, not only is Section 1.17 violated, but the respondent would in addition be subject to potential enforcement action, including possible license revocation, on separate misrepresentation and lack of candor grounds. An unintentional misstatement or omission, on the other hand, would lack the necessary subjective deceptive intent to justify a misrepresentation or candor issue. But it would still be potentially violative of the Section 1.17 if the misstatement or omission were "willful" in the sense that word is used in determining whether Commission regulations have been violated.

C. RECIPROCAL RIGHTS AND OBLIGATIONS

Kay acknowledges that applicants and licensees have obligations to the Commission and to the public interest, including, *inter alia*, the obligation to provide complete, accurate, and responsive information in support of the Commission's licensing, enforcement, and other regulatory functions. Rights and obligations are two sides of the same coin. One does not enjoy rights without also accepting the appropriate concurrent obligations. By the same token, an authority does not (or at least should not) seek to impose obligations without also recognizing and protecting the appropriate concurrent rights. In the enforcement context, therefore, both the targets of a Commission investigation or inquiry ***and*** the Commission personnel involved have both rights and obligations.

Enforcement, properly implemented, is thus a reciprocal function, in which the Commission has obligations and the regulated party has rights, as well as vice versa. The parties whom the Commission regulates, after all, are also part of the "public" in the "public interest" that guides the Commission's actions. In this connection, on December 4, 2001, Kay submitted a *Petition for Rulemaking* in which he proposes that the Commission adopt a "Licensee's Bill of Rights" to protect the due process and other legal and equitable rights of Title III licensees in connection with the Commission's exercise of its enforcement powers. A copy of Kay's Petition for Rulemaking is appended hereto as Attachment No. 1 and is fully incorporated herein by this reference.

D. CONCLUSION

WHEREFORE, James A. Kay, Jr., respectfully requests that these comments be fully considered and that the specific proposals and recommendations set forth herein be adopted by the Commission.

James A. Kay, Jr.

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Dated: April 8, 2002

ATTACHMENT NO. 1

ATTACHMENT NO. 1

ATTACHMENT NO. 1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Amendment of the Commission's Rules Regulations to Adopt Protection of the Due Process Rights and Other Protections of Title III Licensees in Connection With the Exercise by the Commission and its Staff of the Commission's Enforcement Powers and Certain Licensing and Regulatory Functions	)	RM-_____

PETITION FOR RULEMAKING

James A. Kay, Jr. ("Petitioner"), by his attorney, and pursuant to Section 4 of the Administrative Procedure Act, as amended, 5 U.S.C. § 553, Section 303(f) of the Communications Act of 1934, as amended, 47 U.S.C. § 303(f), and Section 1.401(a) of the Commission's Rules and Regulations, 47 C.F.R. § 1.401(a), hereby petitions the Commission to initiate a rulemaking proceeding looking toward adoption of new rules and regulations and the amendment of existing rules, as described more fully herein.

I. INTRODUCTION

The purpose of the requested rule changes is to protect the due process and other legal and equitable rights of Title III licensees in connection with the Commission's exercise of its enforcement powers. Petitioner makes these recommendations in light of years of personal experience with the Commission's enforcement procedures and practices, particularly in connection with WT Docket No. 94-147. These proposals are not, however, directed at the merits of that proceeding, but rather look toward specific changes in the Commission's rules that will protect the due process rights of licensees, while at the same time not hindering, and indeed even enhancing, the Commission's enforcement efforts.

II. A "BILL OF RIGHTS" FOR TITLE III LICENSEES

Petitioner sets forth herein ten specific proposals for the protection of the due process of rights of licensees who are the target of investigations or enforcement actions. These are divided

into three categories: (a) informal investigations, (b) sanctions and hearing proceedings, and (c) miscellaneous matters. In addressing each item the goal has been to find the proper balance between the due process rights of the licensee, on the one hand, and the Commission's enforcement powers and duties on the other.

A. INFORMAL INVESTIGATIONS

1. The *ex parte* rules shall be honored in any complaint or other solicitation that involves, directly or indirectly, the merits of the grant, renewal, retention, or modification of any Title III authorization.

Petitioner first recommends that the Commission amend its *ex parte* rules, *Part 1, Subpart H, of the Commission's Rules and Regulations*, 47 C.F.R. § 1.1200 *et seq.*, to require service of process and an opportunity to respond to all complaints, whether formal or informal, that go to the substance of a licensee's qualifications or the propriety of a particular license under Title III of the Communications Act. The Commission currently entertains complaints against licensees on an *ex parte* basis. The Commission may serve the complaint on the licensee and request a response, but the Commission also sometimes commences an investigation without advising the licensee that there has been a complaint.

Petitioner does not question the Commission's authority and duty to conduct undisclosed investigations. A problem arises, however, when a licensee's competitors or other adverse parties submit ex parte complaints that, if properly submitted in the context of an adjudication under Title III of the Communications Act, would require service on the licensee. Clearly, if one files a petition to deny a Title III application,[1] a petition for reconsideration or an application for review of an action granting a Title III authorization,[2] or a request that a particular Title III license be modified or rescinded,[3] such filing would have to be served on the applicant or licensee. One should not be able to side-step the ex parte rules and the service of process requirements by

[1] 47 U.S.C. § 309(d); 47 C.F.R. § 1.939.
[2] 47 U.S.C. § 405(a); 47 C.F.R. §§ 1.106 & 1.115.
[3] 47 U.S.C. §§ 312 & 316.

simply submitting a complaint asserting the same substantive issues, but styling it as a complaint rather than a formal adjudicatory pleading.

Thus, the ex parte restriction should be broadened to encompass any complaint or communication that raises issues possibly relevant to the target's ability to obtain or retain a Title III authorization. The most obvious example would be a complaint that calls into the question the basic qualifications of the licensee, but the same restriction should also apply to any such filing that goes to the merits of any particular authorization or application for any reason.

2. Compliance with a request for information pursuant to Section 308(b) of the Communications Act is voluntary and such requests Section 308(b) does not supersede the formal subpoena procedures set forth in Section 409 of the Act.

A frequent tool used by Commission staff in enforcement investigations is what has come to be known as a "Section 308(b) Request." Pursuant to Section 308(b) of the Communications Act,[4] the Commission sends a letter to a licensee requesting certain information, in the expectation that the licensee will voluntarily comply. In the vast majority of cases this process works well. Occasionally, however, a licensee may have good and sufficient reasons for demurring to some or all of such a request. Congress certainly did not intend for Section 308(b) to be a blank check that agency may use to buy its way around compliance with Constitutional due process requirements. There must be a balancing between the Commission's need to seek information for legitimate regulatory and enforcement purposes on the one hand, and the licensee's privacy and due process rights on the other. Petitioner respectfully suggests that this balance is adequately struck in the applicable statutory scheme, and the Commission should recognize and codify it.

A staff request for information—even one that invokes Section 308(b) of the Act—is subject only to ***voluntary*** compliance unless the Commission invokes formal procedures, *e.g.*,

[4] 47 U.S.C. § 308(b).

the issuance of a subpoena. In *PTL of Heritage Village Church and Missionary Fellowship, Inc.*,[5] the Commission observed:

> [T]he Commission expects its licensees to cooperate with staff-conducted informal investigations. Sections 403 and 409 of the Act provide the Commission the formal means, *i.e.* subpoena, to obtain books, records and information, but resort to these means in informal investigations has traditionally been unnecessary since most licensees recognize the Commission's authority to inspect such documents. However, when licensees refuse to cooperate in this ***voluntary procedure*** and insist upon formal procedures the Commission will institute a formal proceeding to obtain the information. Under these circumstances, the Commission does not believe its request of licensees to ***voluntarily make available information*** under their control constitutes an unreasonable search under the Fourth Amendment to the Constitution.[6]

This view is supported by an examination of other provisions of the Communications Act. Section 409(e) confers upon the Commission "the power to require by subpoena ... the production of all books, papers, schedules of charges, contracts, agreements, and documents relating to any matter under investigation."[7] But Commission subpoenas are not self-enforcing. Section 409(g) provides that an order compelling compliance with such a subpoena shall issue from an appropriate federal district court.[8] In any judicial proceeding seeking enforcement of a subpoena, the licensee would have the opportunity to challenge the reasonableness, propriety, and scope of the information request.

The Commission should amend its rules to expressly codify the statutory scheme and applicable precedent to expressly provide that, while licensee's are urged to voluntarily comply with requests for information, including Section 308(b) requests, the Commission does not have the unilateral power to compel disclosure or production, but must seek enforcement of a formal subpoena in federal district court, and that a licensee may not be penalized or otherwise disadvantaged for insisting upon its statutory due process rights in connection with information requests.

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[5] 71 FCC 2d 324, 45 RR 2d 639 (1979).
[6] *Id.* at ¶ 12 (emphasis added).
[7] 47 U.S.C. § 409(e).
[8] 47 U.S.C. § 409(f).

3. The scope of any Section 308(b) Request issued under delegated authority shall be subject to immediate review of the full Commission, upon the request of the licensee, and compliance with the request shall be automatically stayed pending such review, including any judicial appeal therefrom.

Petitioner offers this item as an alternative to, but without conceding, item 2, above. If the Commission determines that Section 308(b) gives it independent authority that is not subject to the procedural safeguards, including District Court review, afforded by Section 409 of the Act, then at a minimum the Commission should provide internal steps to protect the licensee's reasonable rights.

The nature of an improper or overbearing request for the production of information is such that all too often there is no after-the-fact remedy. If the licensee ultimately prevails on the issue of whether it was required to produce the information, the fact remains that the information has already been produced. If the licensee is correct that the request is overbroad in scope and overbearing, the fact remains that the onerous compliance has already taken place. It is respectfully suggested that a licensee should have the right to submit, in lieu of a timely response to a Section 308(b) Request, an objections to, questions about, and/or requests to quash or modify the information request.

Such a filing should automatically stay any attempt to enforce the request pending Commission action.

The licensee would present such matters directly to the delegated authority which shall promptly consider it and render a ruling that is fully subject to reconsideration and review. Any such ruling should be limited to the objections raised and should not be coupled with any hearing designation order, lest the licensee's ability to obtain Commission review be effectively thwarted. This is necessary because Sections 1.106(a)(1) and 1.115(e)(3) of the Rules,[9]

[9] 47 C.F.R. §§ 1.106(a)(1) & 1.115(e)(3).

respectively, preclude petitions for reconsideration and applications for review of hearing designation orders.

B. INFORMAL INVESTIGATIONS

4. Prior to the initiation of formal enforcement proceedings (i.e., the adoption of an order to show cause, a hearing designation order, a notice of forfeiture, or other similar proceeding, the licensee shall be provided with a bill of particulars identifying with particularity the suspected violations, setting forth the specific allegations of facts leading such suspicions, and an be afforded an opportunity to respond informally.

When Commission Staff believes that there have been violations of significant magnitude to warrant the imposition of substantial forfeitures or the initiation of hearing proceedings looking toward license revocation and/or issuance of a cease and desist order, it shall first provide the licensee with a bill of particulars stating with specificity the particular statutory, regulatory, or policy violations that are alleged, including the specific factual allegations giving rise to the suspected violation, and shall afford the licensee an opportunity to respond, in writing, to the allegations. The staff shall make a good faith effort to resolve the matter informally, if possible, based on the licensee's response. Even if such resolution is not possible, the licensee's written response shall be included with any memorandum forwarded to and considered by the Commission or the official, under delegated authority, who will have final responsibility for issuance of the designation order.

The purpose underlying this provision is twofold—efficiency and fairness. In most instances it may entirely eliminate the requirement for formal proceedings, thereby saving the Commission time and resources, by allowing for an informal resolution of the matter. When a licensee knows there is a genuine possibility of resolving a matter informally, it is more likely to be forthcoming with information rather than invoking otherwise legitimate legal objections and protections. Moreover, if the licensee knows what the Commission's specific concerns are, it can

more efficiently compile relevant information that is fully responsive to the specific problem, as opposed to a general allegation, thereby making an informal resolution more likely.

This provision also provides for fairness. When staff presents an item to the Commission or to an official with delegated authority recommending the initiation of formal enforcement proceedings of one kind or another, the recommendation and the supporting documents and memoranda are generally one-sided. At a minimum the Commission should have before it the written position of the licensee regarding the matter. If the staff is acting in good faith and in a forthright manner, it has nothing to fear from this procedure. But in any case where staff may be acting in an unnecessarily aggressive or an improperly unreasonable manner, this provision will provide a safeguard by presenting the Commission with an alternative view of the matter.

This procedure, moreover, does not compromise the enforcement process. The bill of particulars need not be provided until such time as the staff anticipates recommending formal proceedings. At that point its investigation should be complete, so there is no concern regarding "tipping off" the target. Further, the Commission will still be making the final determination based on its public interest analysis of the information before it. Having the advantage of the licensees written response to the specific legal and factual charges against it will enhance, not hinder, the Commission's public interest determination.

5. At every stage of any formal enforcement proceeding, including but not limited to license revocation proceedings, the Bureau prosecuting the action on behalf of the Bureau shall respond in good faith to any reasonable settlement proposal, and the possibility of settlement should never be absolutely precluded.

The Commission should amend or clarify Section 1.93(b) of its rules, which provides: "Where the interests of timely enforcement or compliance, the nature of the proceeding, and the public interest permit, the Commission, by its operating Bureaus, may negotiate a consent order with a party to secure future compliance with the law in exchange for prompt disposition of a matter subject to administrative adjudicative proceedings. Consent orders may not be negotiated

with respect to matters which involve a party's basic statutory qualifications to hold a license (see 47 USC §§308 and 309)."[10] This provision, in practice, has often been interpreted as virtually precluding a settlement of a case once the Commission has designated a basic qualifying issue for hearing. In Petitioner's experience, the Wireless Telecommunications Bureau, for example, has often operated under the apparent belief that there must be an ultimate factual determination by the presiding judge on each and every specific issue before consideration of a consent order or other form of settlement is proper. This is simply not so. It is a misinterpretation that frequently results of the unnecessary expenditure of public and private resources in terms time, finances, and personnel.

The Commission's obligation to make specific public interest determinations pursuant to Sections 308 and 309 of Act does not require the rigid and unyielding application of a specific procedural course, and it certainly does not justify a "point of not return" approach. A hearing is only necessary under the Act in those cases where the Commission is unable to make the requisite public interest finding or if there are substantial questions of material fact requiring resolution.[11]

Circumstances may be such in a given case that, without ultimately concluding one way or the other on a specific issue regarding alleged misconduct, the Commission can nonetheless determine that the public interest would be satisfied by a consent order. For example, the licensee may neither admit nor deny the alleged violation, but nonetheless voluntarily agree to the imposition of corrective or prophylactic measures and/or sanctions short of license revocation. Keeping in mind that the underlying concern in all character qualifications matters is not so much the licensee's past conduct, but rather whether the Commission can rely on the

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[10] 47 C.F.R. § 1.93(b).

[11] See *Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392 (D.C. Cir. 1985).

licensee to comply in the future.[12] the Commission might well be able to make the requisite finding that the grant, renewal, or continuation of the license is in the public interest even assuming the licensee had committed the alleged violations.

Petitioner therefore urges the Commission to modify or clarify this rule in such a manner that the negotiation of a consent order or other settlement is an option at any stage of any type of enforcement proceeding.

6. In any proceeding in which Commission seeks to revoke or modify a licensee's existing authorization or impose a cease and desist order, the burdens of proceeding and of proof shall rest solely with the Commission, notwithstanding the consolidation of any application proceedings. Nor shall the Commission seek to adjudicate a licensee's basic qualifications in an application proceeding rather than a revocation proceeding solely for the purpose of avoiding these burdens.

The Communications Act affords Title III applicants and licensees to an evidentiary hearing before a license application may be denied,[13] before an existing license may be modified or revoked during its term,[14] and before a cease and desist order may issue.[15] By these same statutory provisions, however, Congress assigned the burdens of proceeding and of proof on the applicant for an initial license or a renewal, but on the Commission for any post-licensing attempt to modify or curtail the authorization during its term.

The practical reality of many enforcement proceedings, however, is that applications for the revocation of licenses are consolidated in the same proceeding with applications for initial licenses or renewals. The creates a statutory conundrum, because is places on both parties the

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[12] See *Character Qualifications Policy Statement*, 102 FCC 2d 1179 (1986). Although the *Character Policy Statement* addresses the qualifications of broadcast applicants, they also set forth the analytical framework under which the Commission determines character qualifications of non-broadcast applicants. *See Western Telecommunications, Inc.*, 3 FCC Rcd 6405 (1988) (Character Policy Statement used to evaluate qualifications of microwave radio licensees); *A.S.D. Answer Service, Inc.*, 1 FCC Rcd (1986) (Character Policy Statement standards applied to a domestic public radio service application). Accordingly, we will use the standards outlined in the Character Policy Statement as a guideline in this instance." *Mercury PCS II, LLC*, 12 FCC Rcd 18093 (WTB 1997), *aff'd* 15 FCC Rcd 9654 (2000).

[13] 47 U.S.C. § 309(e).

[14] 47 U.S.C. §§ 312(c) & 316(b).

[15] 47 U.S.C. §§ 312(c).

same burdens on the same set of facts. Unless the licensee is willing to risk forfeiting the case on the pending applications, it must effectively waive its statutory right to have the Commission prove a case against it on the revocation, modification, or cease and desist matter.

The solution to this problem is to always keep questions of a licensee's overall qualifications during its license term confined to revocation proceedings, and restrict license application proceedings to the propriety of the particular application assuming the licensee's qualifications. As discussed in the next provision, this does not prejudice the Commission because any applications granted during the interim may be conditioned on the outcome of the revocation case. Even if the Commission were to neglect to impose any such condition, the entire issue of the licensee's qualifications would not have to be re-litigated owing to the doctrine of collateral estoppel.

Notwithstanding the foregoing, if there is a legitimate administrative reason to consolidate application and revocations proceedings, it must not be permitted to effectively revoke the licensee's statutory rights under Sections 312(c) and 316(b).[16] Thus, such consolidation should not be done merely as a procedural tactic to shift the burden on the licensee by fiat. Thus, where there is a legitimate reason for consolidation, it should be made clear that the Commission solely retains the burdens of proceeding and of proof.

7. The Commission shall not delay the processing of routine applications for new or modified facilities because of pending enforcement proceedings.

The Commission should eliminate its practice of freezing the processing of all applications by a licensee solely because the licensee is the target of an investigation or of enforcement proceedings. In the wireless services in particular, one entity typically holds a number of different authorizations under different call signs. The ability to license new facilities and to modify existing facilities is essential to the licensee's ability to keep its wireless system

[16] 47 U.S.C. §§ 312 & 316.

responsive to public mobile communications needs. There is no legitimate reason to interfere with this process even after formal enforcement procedures are initiated, but certainly not when the matter is at the investigation stage.

The simple and equitable solution is for the Commission to keep issues going to the overall basic qualifications of the licensee in the context of license revocation proceedings, and limit formal procedures in any particular application proceeding to the propriety of that particular licensee, assuming the applicant to be qualified. This can be easily accomplished by processing and granting any pending application subject to and expressly conditioned upon the outcome of the license revocation proceeding.

This procedure is also consistent with the spirit, if not the letter, of the applicable statutory provisions. The licensee, because it holds an effective Title III authorization, will have already been adjudicated, pursuant to Section 309(a) of the Act, to be qualified. The Commission now has the burdens of proceeding and of proof, pursuant to Section 312(c) of the Act, to prove otherwise. To paraphrase the bedrock principle of our criminal jurisprudence, an existing licensee should be assumed basically qualified until proven unqualified. Congress obviously anticipated that an existing licensee would continue to enjoy its full rights under the license pending any license revocation proceedings, so there is no reason why this same policy should not extend to pending applications necessary to expand and conform the existing system to market demands. Indeed, to do otherwise is effectively a modification of the existing license without hearing in violation of Section 316(b).[17]

[17] Petitioner also notes that this process would greatly enhance the efficiency of the Commission's license application processing by separating entirely application processing functions from enforcement functions, and would not in any way prejudice the Commission's ability to impose appropriate enforcement sanctions.

8. The Commission's regulatory functions and personnel shall be kept separate from its investigatory and prosecutorial functions.

Implementation of this provision will be much easier now that the Commission has established an autonomous Enforcement Bureau. In the past, wireless licensees who were targets of investigations and enforcement proceedings have been in the extremely difficult position that the same Commission personnel who regulate their affairs on a day-to-day basis are also actively involved in the investigation. Then the same personnel play a key role in obtaining a designation order from the Commission, or they designate the matter themselves if the Bureau has delegated authority to do so. Following designation, the same Commission personnel then act in a prosecutorial role.

This places the licensee in an untenable position. On the one hand he must be able to have a comfortable working relationship with the operating Bureau, but very often the same Bureau personnel serve as investigators, arresting officers, arraignment judge, grand jury, and prosecutor in an enforcement proceeding. This often begins before the licensee even knows it, so that the putative regulator is actually wearing a policeman's cap or a prosecutor's suit without the licensee's knowledge.

Also, prior to designation the Bureau communicates freely with all levels of decision making personnel within the Commission regarding the matter—discussion to which the licensee is not privy, even though they will later have a significant impact on the case. Then, immediately upon designation, a magic wall comes down and both the Bureau and the licensee are now subject to the ex parte rules, precluding any future discussions. It is as if a future plaintiff gets to lay out his case and strategy before the appellate court on an ex parte basis before the action is filed, but the defendant is precluded from having any such discussions.

This problem can be ameliorated by keeping the investigatory and prosecutorial functions within the Enforcement Bureau, and the licensing and regulatory functions within the Wireless

Bureau. This does not mean that Wireless Bureau personnel may not refer matters to the Enforcement Bureau for investigation and appropriate action. Nor does it mean the Enforcement Bureau may not call upon the Wireless Bureau for occasional expertise. But given the statutory scheme, and given the Commission's implementation of it, most formal enforcement proceedings are adversary in nature, and this provision will serve to prevent the fairness of that system from being compromised before the proceeding even commences.

B. MISCELLANEOUS MATTERS

9. To the extent permitted by applicable statutes, discovery rights in enforcement hearings shall be reciprocal.

The Commission's hearing and discovery rules are grossly unfair to the private sector parties, particularly with regard to the use of document production requests. The prosecuting Bureau may serve enforceable document requests upon the applicant or licensee, imposing a considerable burden in terms of time, personnel, and money. If the licensee wishes to obtain documents from the Commission, however, it is forced to resort to a formal FOIA request, a procedure that places restrictions on the scope of the request that are not applicable to requests by the Bureau, and requiring the party to pay the Commission for the search and retrieval of such documents. Again, this is an unfair situation that is not in keeping with the adversarial nature of the proceedings.

The remedy is not complex. First, the same discovery procedures and standards should be available to both parties on an equal, reciprocal basis. Second, if the private party's document request seeks the production of items that the Commission would be exempt from producing under FOIA, the information shall be produced subject to an appropriate protective order. Third, if the private party seeks production of items that the Commission is prohibited by statute from publicly disclosing, the Bureau shall so state in an objection, and the private party would then have the opportunity to ask the presiding judge to compel production. In that context the

presiding judge could evaluate the validity of the Bureau's statutory objection, and could determine whether it is possible to provide all or some part of the material requested while not contravening the statute.

10. Applicants and licensees shall be afforded an opportunity for truly independent Commission review of adverse actions by delegated authority.

By both statute and regulation parties adversely affected by Commission actions are entitled to internal review of the matter before being required to seek judicial review. Parties always have the option, of course, of asking the ruling authority to reconsider its action.[18] When the action is taken by a delegated authority, however, the applicant is also permitted, and indeed required, to seek review of that action by the Commission itself before seeking judicial review.[19] But so-called "applications for review" of Bureau actions are almost never any such thing. Invariably the same employee who made the initial ruling and who ruled on any petition for reconsideration is assigned the task of reviewing the matter and preparing a decision on behalf of the Commission.

This practice is of questionable legality,[20] but it is certainly inequitable. It transforms what should be an application for review into little more than a second petition for reconsideration. In addition to depriving the licensee of a truly independent review of the delegated authority action, this dual reconsideration is an inefficient use of the Commission's resources. The Commission currently has a separate division of its Office of General Counsel review and make recommendations on its rulings on exceptions to initial decisions of administrative law judges in hearing cases, and a similar procedure should be filed in non-hearing cases where Commission review of delegated authority actions is sought.

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[18] 47 U.S.C. § 405(a); 47 C.F.R. § 1.106.

[19] 47 U.S.C. § 155(c)(4)-(7); 47 C.F.R. § 1.115.

[20] It arguable contradicts the system Congress anticipated. See, e.g., 47 C.F.R. § 155(c)(8), which clearly seems to assume an actual review by different personnel.

III. CONCLUSION

WHEREFORE, it is respectfully requested that the Commission initiate a rulemaking proceeding looking toward adoption of rules as proposed herein.

Respectfully submitted on December 4, 2001,

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